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August 6, 2009

VIA E-MAIL

The Honorable L. Felipe Restrepo
United States District Court, Eastern District of Pennsylvania
Room 3038, U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Re: Griffin-El v. Beard, et al., Civ. A. No. 06-2719 (E.D. Pa.)

Dear Judge Restrepo:

I write to address Defendants' continued insistence upon the legally unwarranted claims advanced in their Motion to Disqualify Plaintiff's Counsel (the "Motion"), and reiterated in Defendants' Reply to Plaintiff's Response to the Motion (the "Reply"). Specifically, Defendants continue to argue that Plaintiff's Counsel should be disqualified for failing to avoid even the appearance of impropriety, even though this claim is wholly unsupported by existing law. See Plaintiff's Opposition to the Motion (the "Opposition") at 10-11.

As an initial matter, Defendants cite no new authority in the Reply to support their claims that Plaintiff's Counsel violated Pennsylvania Rule of Professional Conduct ("PRPC") Rule 1.7 (relating to concurrent conflicts of interest) or Rule 4.2 (relating to communications with represented persons). Defendants, however, bear the burden of "clearly showing" that disqualification is appropriate, and they have cited no authority supporting their claims. Indeed, Defendants appear to have conceded that there is no "technical" violation of the PRPC. Reply at 2.

Thus, Defendants base their Motion on the meritless appearance-of-impropriety argument. Yet, as noted in Plaintiff's Opposition, "the PRPC has no rule regarding an alleged 'appearance of impropriety.'" Opposition at 10-11. Rather than addressing the fact that there is no rule in the PRPC regarding the appearance of impropriety, Defendants inexplicably argue that "[f]ailing to avoid even the appearance of impropriety is grounds for disqualification." Reply at 5.

The Honorable L. Felipe Restrepo
August 6, 2009
Page 2

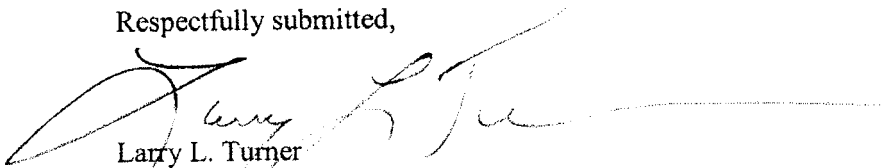
Morgan Lewis
Morgan Lewis
COUNSELORS AT LAW

Indeed, since April 1, 1988, Pennsylvania has not recognized the appearance-of-impropriety rule. The rule regarding the appearance of impropriety was Canon 9 of the Rules of Professional Responsibility, which was superseded when the Pennsylvania Supreme Court adopted the PRPC on October 16, 1987, effective April 1, 1988. See 1989 Pocket Part to Title 42 of Purdon's PA Cons. Stat. Ann., Code of Professional Responsibility at 21, attached hereto as Exhibit A. The PRPC, as enacted in 1987, no longer has a rule relating to the appearance of impropriety. See Id. at 24, attached hereto as Exhibit B.

Defendants cite one case in their Reply that was not cited in their opening brief to support their appearance-of-impropriety argument. Reply at 5 (citing Willis v. Carroll Twosp., No. 1:07-cv-0949, 2008 WL 3200712 (M.D. Pa. Aug. 5, 2008)). Willis relied upon the 1978 decision in IBM Corp. v. Levin, 579 F.2d 271, 283 (3d Cir. 1978). Willis, 2008 WL 3200712, at *1 n. 4. In 1978, however, Canon 9 was still in effect and the Eastern District of Pennsylvania followed the American Bar Association's Model Rules Professional Conduct, rather than the PRPC. See Opposition at 10-11. Willis, moreover, is distinguishable because the court there found that "a concurrent conflict of interest does exist because Attorney Sherr's representation of plaintiff is 'directly adverse' to his representation of Dauphin Borough" Willis, 2008 WL 3200712 at *1 (emphasis added).

The clear and unambiguous language of the rules upon which Defendants allegedly rely do not support their allegations that Plaintiff's Counsel violated the PRPC. In the Reply, Defendants failed to offer any authority to the contrary and, instead, rely upon an outdated rule that is no longer good law. Plaintiff, therefore, respectfully requests that this Court deny Defendants' unwarranted and frivolous Motion.

Respectfully submitted,



Larry L. Turner

cc: Beth Smith, Esquire (via e-mail only)

EXHIBIT A

C1

NO LOAN

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Title 42

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**Includes amendments received
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Philadelphia, Pa.

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PROFESSIONAL RESPONSIBILITY

a Client

that lawyer may represent multiple clients in a situation likely to involve him in representing conflicting interests if it is obvious lawyer can adequately represent interests of each and each conflict after full disclosure. Office of Disciplinary Counsel v. Wittmaack, 522 A.2d 522, 513 Pa. 609, 1987.

purchase of client's property at judicial sale of attorney's conduct in self-dealing with, and using of, his own client's property at foreclosure sale violated canons of professional ethics, including Code of Prof. Resp. DR 5-103 governing conflict of interest in litigation, DR 5-104 governing business relations with client, and code of professional responsibility rule to be effective in governing conflict of interest and prohibiting transactions. In re Tighe, 1988, 82 B.R. 724.

Employment if the Interests of Independent Professional Judgment of

Consent

that clients sign multiple representation agreement does not constitute waiver of their right with respect to attorney's representation. If both sides involved in real estate transaction but rather, is merely evidence to be considered with respect to substantive question of whether attorney made proper disclosures and did proper consent to multiple representation clients. Office of Disciplinary Counsel v. Wittmaack, 522 A.2d 522, 513 Pa. 609, 1987.

Purpose

motion of attorney's undivided loyalty and in representing interests of client is design disciplinary rules prohibiting attorney from accepting employment if his professional judgment is affected by his own interests unless client consents after full disclosure, prohibiting attorney from entering into business transaction with client if he have different interests unless client has consented after full disclosure, requiring attorney to decline proffered employment if his professional judgment is likely to be adversely affected by acceptance of proffered employment, and providing that lawyer may represent multiple clients in a situation likely to involve him in representing conflicting interests if it is obvious lawyer can adequately represent interests of each and each conflict after full disclosure. Office of Disciplinary Counsel v. Wittmaack, 522 A.2d 522, 513 Pa. 609, 1987.

Action

petition for discipline will be dismissed while there was an admitted technical violation of this disciplinary rule in that accepted practice case against a law firm which he entered in collection cases without discussing with either client the exercise of the attorney's independent professional judgment on its behalf, did not obtain its consent to be in the malpractice case, the attorney immediately withdrew

PROFESSIONAL RESPONSIBILITY

Canon 9

from the collection matter. In re Anonymous No. 10 D.B. 86, 43 D. & C.3d 547, 1987.

10. Disqualification of law firm

If attorney who debtor had consulted about possibility of filing bankruptcy and options in bankruptcy for dealing with creditors were dis-

qualified, law firm that attorney had later joined would also have to be disqualified from representing the creditors in bankruptcy case, where firm admitted that the attorney was not properly screened from participation in bankruptcy case. In re Highway Truck Drivers and Helpers Local Union No. 107, 1988, 86 B.R. 404.

Canon 7

A Lawyer Should Represent a Client Zealously Within the Bounds of the Law

Superseded

The Code of Professional Responsibility is superseded, for professional misconduct occurring after March 31, 1988, by the Rules of Professional Conduct, post, adopted October 16, 1987 by the Supreme Court of Pennsylvania, effective April 1, 1988. However, the order adopting the Rules of Professional Conduct provides that professional misconduct occurring on or before March 31, 1988 shall be governed by the present Code of Professional Responsibility, which is continued in full force and effect as grounds for disciplinary action.

DISCIPLINARY RULES

DR 7-101. Representing a Client Zealously

Notes of Decisions

Neglect 3

3. Neglect

An attorney who neglects a legal matter and fabricates a letter to the client to deceive disciplinary counsel violates Rules of Prof. Resp. DR 1-101(A)(3), DR 1-102(A)(3)(4), (5) and (6), DR

7-101(A)(1), (2), and the attorney will receive a public censure. In re Anonymous No. 96 D.B. 85, 44 D. & C.3d 326, 1987.

An attorney who neglects a legal matter and fabricates a letter to the client to deceive disciplinary counsel violates DR 1-101(A)(3), DR 1-102(A)(3)(4), (5) and (6), DR 7-101(A)(1), (2), 42 Pa.C.S.A., and the attorney will receive a public censure. In re Anonymous No. 96 D.B. 85, 44 D. & C.3d 326, 1987.

DR 7-102. Representing a Client Within the Bounds of the Law

Notes of Decisions

Conduct of criminal defense 3

3. Conduct of criminal defense

Protection of right to competent counsel is sacred and respected right in Commonwealth, but that right was never intended to embrace license for defense counsel to subvert fact finding process by intentional acts, to provide basis for subsequent

finding that counsel was ineffective. Com. v. Bolden, 534 A.2d 456, 517 Pa. 10, 1987.

Although criminal defense counsel is not under same constraint to disclose information unfavorable to his client as is prosecution, since he is not responsible for conducting or furthering prosecution, defense counsel is nevertheless under same restraint not to deliberately distort facts to create defenses not legitimately raised under facts of the case. Com. v. Bolden, 534 A.2d 456, 517 Pa. 10, 1987.

Canon 9

A Lawyer Should Avoid Even the Appearance of Professional Impropriety

Superseded

The Code of Professional Responsibility is superseded, for professional misconduct occurring after March 31, 1988, by the Rules of Professional Conduct, post, adopted October 16, 1987 by the Supreme Court of Pennsylvania, effective April 1, 1988. However, the order adopting the Rules of Professional Conduct provides that professional misconduct occurring on or before March 31, 1988 shall be governed by the present Code of Professional Responsibility, which is continued in full force and effect as grounds for disciplinary action.

Canon 9

DR 9-101

PROFESSIONAL RESPONSIBILITY

DISCIPLINARY RULES

DR 9-101. Avoiding Even the Appearance of Impropriety

Notes of Decisions

Former representation of adversary 6

6. Former representation of adversary

Civil assault plaintiff's law firm was not disqualified because one of its partners had previously

represented the defendant, a city agency, where defendant failed to demonstrate any connection between current lawsuit and any matter over which law firm's partner had exercised control during his employment; partner's acquisition of superior knowledge of agency's administrative procedures was not sufficient to warrant disqualification. *Caracciolo v. Ballard*, 1988, 687 F.Supp. 159.

DR 9-102. Preserving Identity of Funds and Property of a Client

Notes of Decisions

2. Disbarment, in general

An attorney who, as the administrator of a deceased's estate, commingles and converts estate funds, fails to account accurately therefor and engages in deceptive fee charging and fraudulent tax appeals violates Code of Prof. Resp. DR 1-102(A)(3), (4), (5) and (6); 6-101(A)(3); 7-101(A)(2); 7-102(A)(2); 9-102(A); and 9-102(B)(3) and (4), 42 Pa.C.S.A., and will be disbarred. In re Anonymous No. 22 D.B. 85, 45 D. & C.3d 249, 1986.

4. Forgery

An attorney who submits to an insurer a release bearing a forged signature, who negotiates a draft

over a forged endorsement, who commingles and who converts the proceeds for his own benefit violates Code of Prof. Resp. DR 1-102(A)(3), (4) and (6); 9-102(B)(1) and (4), 42 Pa.C.S.A., and will be disbarred. In re Anonymous No. 22 D.B. 85, 45 D. & C.3d 249, 1986.

An attorney who forges the clients' signature on a release and settlement draft, and fails to deposit another client's funds in an escrow account, violates DR 1-102(A)(4) and (6) and 9-102(A) and (B)(3) and the attorney will be suspended from the practice of law for two years; a seven-year delay in the prosecution is considered as a mitigating factor. In Re Anonymous No. 16 D.B. 85, 43 D. & C.3d 293, 1987.

RULES OF PROFESSIONAL CONDUCT

Adopted

Effective

Adopted October 16, 1987
effective April 1, 1988

The order adopting the Rules of Professional Conduct, that:

1. The Rules of Professional Conduct in the form attached hereto shall be the Code of Professional Responsibility for the State of Pennsylvania.

2. This order shall take effect on the date of the adoption of the Rules of Professional Conduct and shall be subject to the provisions of the Code of Professional Responsibility.

3. The Rules of Professional Conduct shall be subject to the provisions of the Code of Professional Responsibility, which is contained in the disciplinary action, as if this

PREAMBLE: A LAWYER'S RESPONSIBILITIES

SCOPE

TERMINOLOGY

CLIENT-LAWYER RELATIONSHIP

Rule

- 1.1. Competence.
- 1.2. Scope of Representation.
- 1.3. Diligence.
- 1.4. Communication.
- 1.5. Fees.
- 1.6. Confidentiality of Information.
- 1.7. Conflict of Interest: General Rule.
- 1.8. Conflict of Interest: Prohibited Transactions.
- 1.9. Conflict of Interest: Former Client.
- 1.10. Imputed Disqualification: General Rule.
- 1.11. Successive Government and Private Employment.
- 1.12. Former Judge or Arbitrator or Law Clerk.
- 1.13. Organization as Client.
- 1.14. Clients Under a Disability.
- 1.15. Safekeeping Property.
- 1.16. Declining or Terminating Representation.

COUNSELOR

- 2.1. Advisor.
- 2.2. Intermediary.
- 2.3. Evaluation for Use by a Third Person.

EXHIBIT B

C1

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SIONAL RESPONSIBILITY

LES

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roperty of a Client

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RULES OF PROFESSIONAL CONDUCT

Adopted October 16, 1987

Effective April 1, 1988

Adopted October 16, 1987, by the Supreme Court of Pennsylvania, effective April 1, 1988

The order adopting the Rules of Professional Conduct provides, in part, that:

1. The Rules of Professional Conduct are adopted and promulgated in the form attached hereto. Any Comments or Comparisons to the Code of Professional Responsibility shall not be a part of the Rules of Professional Conduct.

2. This order shall take effect on April 1, 1988 at which time the Rules of Professional Conduct shall supersede the present Code of Professional Responsibility.

3. The Rules of Professional Conduct, as adopted hereby, do not apply to professional misconduct occurring on or before March 31, 1988. Such misconduct shall be governed by the present Code of Professional Responsibility, which is continued in full force and effect as grounds for disciplinary action, as if this order had not been adopted.

PREAMBLE: A LAWYER'S RESPONSIBILITIES

SCOPE

TERMINOLOGY

CLIENT-LAWYER RELATIONSHIP

Rule

- 1.1. Competence.
- 1.2. Scope of Representation.
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COUNSELOR

- 2.1. Advisor.
- 2.2. Intermediary.
- 2.3. Evaluation for Use by a Third Person.

ADVOCATE

Rule

- 3.1. Meritorious Claims and Contentions.
- 3.2. Expediting Litigation.
- 3.3. Candor Toward the Tribunal.
- 3.4. Fairness to Opposing Party and Counsel.
- 3.5. Impartiality and Decorum of the Tribunal.
- 3.6. Trial Publicity.
- 3.7. Lawyer as Witness.
- 3.8. Special Responsibilities of a Prosecutor.
- 3.9. Advocate in Nonadjudicative Proceedings.
- 3.10. Issuance of Subpoenas to Lawyers. [New]

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

- 4.1. Truthfulness in Statements to Others.
- 4.2. Communication with Person Represented by Counsel.
- 4.3. Dealing with Unrepresented Person and Communicating with One of Adverse Interest.
- 4.4. Respect for Rights of Third Persons.

LAW FIRMS AND ASSOCIATIONS

- 5.1. Responsibilities of a Partner or Supervisory Lawyer.



"Smith, Beth"
<bsmith@attorneygeneral.gov>
v>

08/06/2009 03:56 PM

To "Judge_Restrepo@paed.uscourts.gov"
<Judge_Restrepo@paed.uscourts.gov>,
"Christofer_Bates@paed.uscourts.gov"
cc "Lee, John" <jlee@morganlewis.com>, "Turner, Larry L."
<lturner@morganlewis.com>

bcc

Subject RE: Letter & Attachments to Judge Restrepo; 8/6/09

Dear Judge Restrepo,

Given several fairly recent rulings by federal courts sitting in Pennsylvania, it appears that a lawyer's duty to avoid the appearance of impropriety is not as defunct as Mr. Turner claims. *See, e.g.*, AAMCO Transmissions, Inc. v. Baker, 2008 WL 5272781, *2 (E.D. 2008) (noting that Rules of Professional Conduct "protects a broader concern for public confidence in the process of justice by avoiding the appearance of impropriety or misconduct on the part of attorneys"); Municipal Revenue Services, Inc. v. Xspand, Inc., 537 F.Supp.2d 740, 745 (M.D.Pa.2008)(granting motion for disqualification based on counsel's failure to avoid even appearance of impropriety).

As stated in my motion and reply brief, a court may disqualify counsel even where counsel has not technically violated the Rules of Professional Conduct.

Thank you again for your consideration of this matter.

Beth Smith

-----Original Message-----

From: Borschell, Jeanne C. [<mailto:jborschell@morganlewis.com>] On Behalf Of Turner, Larry L.
Sent: Thursday, August 06, 2009 3:25 PM
To: 'Judge_Restrepo@paed.uscourts.gov'; 'Christofer_Bates@paed.uscourts.gov'
Cc: Smith, Beth; Lee, John
Subject: Letter & Attachments to Judge Restrepo; 8/6/09

Please see attached correspondence & exhibits.

Jeanne C. Borschell
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"Lee, John"
<jlee@morganlewis.com>
08/06/2009 05:48 PM

To ""Judge_Restrepo@paed.uscourts.gov""
<Judge_Restrepo@paed.uscourts.gov>,
""Christofer_Bates@paed.uscourts.gov""
cc "Turner, Larry L." <lturner@morganlewis.com>, "Smith,
Beth" <bsmith@attorneygeneral.gov>
bcc

Subject RE: Letter & Attachments to Judge Restrepo; 8/6/09

Dear Judge Restrepo,

Neither of the cases cited by Defendants support their Motion. The first case involved a motion in limine based on PRPC 3.7 (relating to a lawyer testifying as a witness), and the second relied upon a decision from 1978. In any event, neither of these cases, like all of the cases cited by Defendants thus far in support of their Motion, are remotely analogous to the situation here.

In AAMCO Transmission, Inc. v. Baker, the court granted a motion in limine filed by plaintiff to preclude defendant from calling plaintiff's counsel as a witness at trial. No. 06-cv-05252, 2008 WL 5272781, *2 (E.D. Pa. Dec. 18, 2008). AAMCO involved PRPC Rule 3.7, which prevents a lawyer from acting as an advocate in a trial where the lawyer is "likely to be a necessary witness" unless certain conditions are met. AAMCO explained, in dicta, that: "As the comments [to] Rule 3.7 explain '[c]ombining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.' Pa. R.P.C. 3.7 Cmt. 1. This rule protects 'a broader concern for public confidence in the process of justice' by avoiding the appearance of impropriety or misconduct on the part of attorneys." Id. (internal citations and quotations omitted). PRPC Rule 3.7 is **not** at issue in the case at bar.

In Municipal Rev. Servs., Inc. v. Xspand, Inc., the court granted a motion to disqualify an attorney, **after finding a concurrent conflict of interest** in violation of Rule 1.7 existed. 537 F. Supp. 2d 740, 746 (M.D. Pa. 2008). The court in Xspand also relied upon IBM Corp. v. Levin, 579 F.2d 271 (3d Cir. 1978), for the proposition that a court may disqualify an attorney for failing to avoid even the appearance of impropriety. As noted in Plaintiff's Opposition, however, and as reiterated in the letter to the Court today, Levin was decided in 1978, when Canon 9 was still in effect and when this Court followed the ABA Model Rules rather than the PRPC.

Respectfully submitted,

W. John Lee

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From: Smith, Beth [mailto:bsmith@attorneygeneral.gov]

Sent: Thursday, August 06, 2009 3:57 PM

To: 'Judge_Restrepo@paed.uscourts.gov'; 'Christofer_Bates@paed.uscourts.gov'

Cc: Lee, John; Turner, Larry L.

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